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IN THE

Supreme Court of the United States

No. 706

October Term, 1968

WILLIAMS AND COMPANY, INC.,
Appellant,

v.

THE CITY OF PITTSBURGH and DAVID A. SMITH, Treasurer, and SCHOOL DISTRICT OF PITTSBURGH and DAVID A. SMITH, Treasurer.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA AT NOS. 38 AND 39 MARCH TERM, 1968.

JURISDICTIONAL STATEMENT AND APPENDICES

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JURISDICTIONAL STATEMENT

I. Reports of Opinions of Lower Courts

The opinion of the Supreme Court of Pennsylvania is officially reported at 430 Pa. 509 (1968). It is unofficially reported at 244 A. 2d 37 (1968). The opinion of the County Court of Allegheny County is not reported anywhere either officially or unofficially. Copies of all relevant opinions are appended hereto.

II. Grounds Upon Which Jurisdiction is Invoked

This proceeding is an appeal to the court from a decision of the two taxing bodies, acting through their common trea-

surer, levying a mercantile tax upon the appellant taxpayer at the highest rate allowable. The School District of Pittsburgh proceedings were pursuant to the Act of June 20, 1947, P. L. 745, as amended, 24 P. S. §§ 582.1 *et seq.* The City of Pittsburgh proceeding was based upon the authority of the Act of June 25, 1947, P. L. 1145, as amended, 53 P. S. §§ 6851 *et seq.* The latter is known as the "Tax Anything Act."

The judgment or decree sought to be reviewed is the same as the opinion of the Pennsylvania Supreme Court. The opinion of the Supreme Court of Pennsylvania is dated, July 1, 1968. Thereafter, a timely Petition for Reargument was filed. Reargument was denied, without further opinion, on August 5, 1968, and the decision thereupon became final. Notice of Appeal was filed in the Supreme Court of Pennsylvania on October 24, 1968.

Jurisdiction is conferred upon the Supreme Court of the United States by 62 Stat. 929, 28 U. S. C. A. § 1257 (2) which authorizes appeals to the United States Court from State Supreme Court where the constitutionality of a state statute is challenged and the highest court of the State involved sustains the validity of the statute.

The cases believed to sustain the jurisdiction of the United States Supreme Court are, among others:

Cramp v. Board of Public Instruction of Orange County, Florida, 368 U. S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); and

Winters v. New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948); and

Musser v. State of Utah, 333 U. S. 95, 68, S. Ct. 397, 92 L. Ed. 592 (1948); and

Supreme Lodge v. Meyer, 265 U. S. 30, 44 S. Ct. 432, 68 L. Ed. 885 (1924); and

Crew Levick Co. v. Commonwealth of Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295 (1917).

These cases establish a rule of law that the authoritative interpretation of a statute by a state Supreme Court establishes the final meaning of the statute on the point involved just as though the statute had been amended in a like manner by the legislature. This is precisely what is involved in the present appeal.

The statutes involved are quite simple. The provision of the law relating to the School District are as follows:

"§ 1 (3) 'Retail dealer' or 'Retail vendor' shall mean any person who is a dealer in, or vendor of, goods, wares and merchandise who is not a wholesale dealer or vendor." Act of June 20, 1947 P. L. 745, 746, 24 P. S. § 582.1(3).

"§ 1 (4) 'Dealer in, or vendor of, goods, wares and merchandise' shall not include any mechanic who keeps a store or warehouse at his place of manufactory or workshop in which he sells only his own manufactures, any person vending or disposing of articles of his own growth, produce, or manufacture, or any hawker or peddler licensed under any law of this Commonwealth." Act of June 20, P. L. 745, 746, 24 P. S. § 582.1(4).

"§ 3. Beginning in the year one thousand nine hundred forty-eight, and annually thereafter, every person deserving to continue to engage in . . . the business of wholesale or retail vendor of, or dealer in, goods, wares and merchandise, broker . . . shall on or before the first day of January of each license year, or prior to commencing business in any such license year, procure a merchantile license for his place of business, or if more than one, for each of his places of business in the school district from the receiver of school taxes or school treasurer . . . ." Act of June 20, P. L. 745, 747, 24 P. S. § 582.3.

"§ 4. Imposition and Rate of Tax. Every person engaging in any of the following occupations or businesses in any school district of the first class shall pay an annual mercantile license tax at the rate set forth:

". . .

"(3) Wholesale and retail vendors, or dealers in goods, wares and merchandise, at the rate of one-half (½) mill on each dollar of the volume of the annual gross wholesale business transacted by him, and one (1) mill on each dollar of the volume of the annual gross retail business transacted by him." Act of June 20, P. L. 745, 747-748, 24 P. S. § 582.4(3).

The provisions of the statutory law relating to the City are as follows:

"§ 1. A The duly constituted authorities of cities of second class . . . shall have the authority, by ordinance or resolution, for general revenue purposes, to levy, assess and collect or provide for the levying, assessment and collection of such taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivision, as it shall determine, except that such local authorities shall not have authority by virtue of this act to levy, assess and collect . . . (4) a tax on goods and articles manufactured in such political subdivision or the by-products of manufacture . . . or on any privilege, act or transaction related to the business of manufacturing, the production, preparation or processing of minerals, timber and natural resources, or farm products, by manufacturers, by producers and by farmers with respect to the goods, articles and products of their own manufacture, production or growth, or on any privilege, act or transaction relating to the business of processing by-products of manufacture, or the transportation, loading, unloading, or dumping or storage of such goods, articles, products or by-products . . . ." Act of June 25, 1947, P. L. 1145-1146, as amended by Act of May 9, 1949, P. L. 898, 899-900, 53 P. S. § 6851A.

"§ 1. E. No taxes levied under the provisions of this act shall be levied by any political subdivision on the

following subjects exceeding the rates specified in this subsection:

". . .

"(b) On each dollar of the whole volume of business transacted by wholesale dealers in goods, wares and merchandise, 1 mill; by retail dealers, in goods, wares and merchandise . . . 1½ mills; except in cities of second class, where rates shall not exceed 1 mill on wholesale dealers and 2 mills on retail dealers and proprietors." Act of June 25, 1947, P. L. 1145, as amended by Act of May 9, 1949, P. L. 898, 901, as amended by Act of May 27, 1953, P. L. 234, 236, 53 P. S. § 6851E.

III. Questions Presented by the Appeal

A. Are not state statutes, which authorize local taxing bodies to impose palpably disproportionate taxes on competitors in the same market area, violative of the Commerce Clause of the Constitution of the United States?

B. Are not state statutes, which authorize local taxing bodies to impose palpably disproportionate taxes on competitors in the same market area in such a manner as to interfere with the balance of competition therein, violative of Article 6, Clause 2 of the Constitution of the United States insofar as they disrupt the competitive balance established and preserved by the federal anti-trust laws?

C. Does not a taxpayer have a constitutional right to have constitutional questions, which are properly raised, heard by the courts in which those questions are raised?

IV. Statement of the Case

The appellant, Williams and Company, Inc., is a national distributor of certain metals and metal products such as nickel, stainless steel, copper, aluminum, brass, carbon steel products and steel tubing. It does business with manufacturers, fabricators, processors and repair and maintenance people among others. In connection with this business, the taxpayer engages in certain transactions which involve shipments directly from the supply mills. The customers place their orders with the taxpayer and the taxpayer then secures the items for the customers, placing the same order with the mill as the customer placed with Williams and Company, Inc. The mill sells to Williams and Company, Inc. f. o. b. cars point of origin and Williams and Company, Inc. sells to its customers on the same basis. The appellant also has extensive metal sales out of its warehouse as well.

The metals distribution industry is very competitive. In this market area, the appellant taxpayer has approximately thirteen competitors of consequence. These include United States Steel Corporation, Aluminum Company of America, International Nickel Company and Jones & Laughlin Steel Corporation, among others. A complete list may be found on page 98a of the printed record from the proceedings before the trial court which has been certified to this Court by the Supreme Court of Pennsylvania. Eleven of these companies with which the taxpayer must compete in the Pittsburgh market area are exempted from mercantile taxation because they manufacture their own products.

The appellant taxpayer, on the other hand, because of the decision of the Supreme Court of Pennsylvania, is taxed at the highest possible rate. The Pennsylvania Supreme

Court has decided that this is what the statutes involved mean and require.[1]

While the case was before the lower court, and after an initial hearing had been afforded the taxpayer, the taxpayer petitioned the court to reopen the hearing, the said petition being printed in the appendix to this Jurisdictional Statement beginning on page 12. In this petition, the first two constitutional questions were raised. After the hearing, the trial court (County Court of Allegheny County, Pennsylvania) wrote an opinion, part of which concerned the question of constitutionality. However, instead of answering the question raised, the Court simply decided the general question of the constitutionality of such statutes without making any reference to the authority cited from this Court. The "Memorandum and Order" of the trial court is printed in the appendix hereto beginning on page 17.

Since the taxing bodies lost one aspect of the case in the trial court, an appeal was taken to the Supreme Court of Pennsylvania. The appeal taken was discretionary with the Supreme Court of Pennsylvania, and the taxing bodies were required to file a Petition for Writ of Certiorari. In the taxpayer's Answer, the constitutional questions were raised again. This Answer is printed in the appendix hereto beginning on page 21. When the appeal was allowed and briefs were filed, the questions were again raised by the taxpayer in its printed brief as appellee. The briefs have been certified to this Court by the Supreme Court of Pennsylvania for this Court's

[1] It should be noted that while the case was before the Pennsylvania courts, the issues herein raised were presented in a slightly different manner. The Pennsylvania courts had not yet construed the statute within the framework of the present case. The taxpayer argued that, if the courts reached the conclusion the Pennsylvania Supreme Court ultimately did, the result would be unconstitutional for the reasons herein set forth.

examination. The Supreme Court of Pennsylvania, after oral argument (at which the taxpayer *again* raised the two constitutional questions) then reversed the lower court. The opinion is printed in the appendix hereto beginning at page 28. The Supreme Court of Pennsylvania decided that the classifications involved were reasonable (an issue not raised by the taxpayer), but, like the trial court, never at any time attempted to decide the issues that were squarely raised nor did it at any time discuss or even refer to the authority cited from this Court.

Thereafter followed a timely Petition for Reargument in which all of the foregoing was set forth. The questions were once again raised. This Petition for Reargument is printed in the appendix hereto beginning at page 33. In this petition, the third question was raised for the first time and the assertion was therein made that the taxpayer, under the circumstances of this case, had a constitutional right to have its constitutional questions decided. The Supreme Court of Pennsylvania denied the Petition for Reargument. Therefore, without ever facing the constitutional questions raised, the Supreme Court of Pennsylvania in effect ruled that the statute requires this taxpayer to pay a mercantile tax at its maximum rate while its competitors in the same market area are not taxed at all.

The record from the trial court demonstrates that such taxation affects the taxpayer's competitive position in that it reduces the number of sales personnel available, it reduces additional trucking service and it reduces advertising help. The taxpayer would be substantially more competitive in the market except for the imposition of the tax of which complaint is made (R. 81a-82a). The Supreme Court of Pennsylvania, as well as the trial court, refused to consider the matter.

V. The Federal Questions are Substantial.

It is contended that the federal questions are substantial. In this connection, the Court should do one of two things. It should either reverse and remand the case to the Pennsylvania Supreme Court for a consideration of the constitutional questions raised [*Cf. In the Matter of Whittington*, 391 U. S. 341, 88 S. Ct. 1507, 20 L. Ed. 2d 625 (1968)], or grant a plenary hearing.

There is no question but that the Pennsylvania Supreme Court had the obligation to decide the constitutional questions. Irvin v. Dowd, 359 U. S. 394, 404, 79 S. Ct. 825, 3 L. Ed. 2d 900, 907 (1959). And it is well established that where the constitutional questions are raised in the same manner as other questions in the case, the state Supreme Court may not decide the other questions adversely to the appellant and decline to entertain the constitutional claims. Williams v. Georgia, 349 U. S. 375, 383, 75 S. Ct. 814, 99 L. Ed. 1161, 1170 (1955).

There is no doubt that the constitutional question with regard to the violation of the Commerce Clause is a substantial one. For the basic question raised here was brought before this Court for a plenary hearing in *State of Alaska v. Arctic Maid*, 366 U. S. 199, 81 S. Ct. 929, 6 L. Ed. 2d 227 (1961). All of the members of this Court were in agreement on the basic constitutional proposition that a palpably disproportionate tax on competitors in the same market area was a violation of the United States Constitution. While this issue has continually been before the Pennsylvania courts, the doctrine of the *Arctic Maid* has at all times been ignored.

If this question was ignored, the issue raised under the Supremacy Clause was completely forgotten. It was never

alluded to by either of the Pennsylvania courts although it was raised to all states of the proceedings. But the states may not encroach upon "the prerogative of the National Government . . . ." Allied Stores of Ohio v. Bowers, 358 U. S. 522, 526, 79 S. Ct. 437, 3 L. Ed. 480, 484 (1959). Where a federal right is concerned, the Court must inquire into "'the real nature of the tax and its effect upon the federal rights asserted.'" Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 151, 75 S. Ct. 607, 99 L. Ed. 950, 959 (1955). Under antitrust policy of the federal government it is clear that a private company is not permitted to create the competitive situation here that the taxing bodies have, and particularly are not permitted to create a situation which gives an economic advantage to less than all of the parties in the market area involved. The problems of the Borden Company in this regard are most enlightening. See United States v. Borden Company, 370 U. S. 460, 82 S. Ct. 1309, 8 L. Ed. 2d 627 (1962) and Federal Trade Commission v. Borden Company, 383 U. S. 637, 86 S. Ct. 1092, 16 L. Ed. 2d 153 (1966). Here, the taxpayer is competing directly with its suppliers, (United States Steel Corporation, Aluminum Company of America and many others), none of which would be permitted to create the competitive imbalance by pricing procedures that the taxing bodies have by their tax imposition. The federal policy in this area is overriding and controlling any state law intruding into this area must be subject to the overriding federal policy. See, *e.g., Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U. S. 386, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964).

As pointed out above in connection with the cases cited in Section II, this Court has jurisdiction to accept a challenge to the constitutionality of a state statute and the

statute must be held to have the precise meaning given to it by the State Supreme Court. Those cases are cited for that purpose only.

Accordingly, since the matters presented are substantial in nature, they require either a plenary hearing before this Court or a remand to the Pennsylvania Supreme Court for an initial plenary hearing and decision by that Court.

VI. Matters Appended

All matters are appended hereto as required by Rule 15 of the Supreme Court Rules. In addition, certain other matters have also been included for the convenience of the Court. These matters are listed in the Index to the Appendix.[2]

Respectfully submitted,

NORMAN J. COWIE, ESQUIRE,
Attorney for Williams and Company, Inc., Appellant.

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Of Counsel.

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[2] As indicated in part II above, there is no final judgment or decree as such from the Supreme Court of Pennsylvania. The opinion of the Court serves this purpose.